LE COPY

FILED
APR 28 1961
JAMES R. BROWNING, Clerk

No. 871

In the Supreme Court of the United States

OCTOBER TERM, 1960

HARRY HAROLD CHERETON, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	9

CITATIONS

CASES:

Glasser v. *United States*, 315 U.S. 60	8
Marx v. *Chase National Bank*, 117 F. 2d 800	8
Meer v. *United States*, 235 F. 2d 65	7
Quercia v. *United States*, 289 U.S. 466	8
Ulmer v. *United States*, 219 Fed. 641, certiorari denied, 238 U.S. 638	8
United States v. *Margolis*, 138 F. 2d 1002	7
Youroveta Home & Foreign Trade Co., In re, 288 Fed. 507	8

STATUTES:

Bankruptcy Act, Section 21(a), 11 U.S.C. 44(a)	2, 7
18 U.S.C. 152	2, 3, 7
18 U.S.C. 1341	2

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 871

HARRY HAROLD CHERETON, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 286 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1961 (Pet. App. 1). A petition for a rehearing was denied on March 2, 1961 (Pet. App. 9). The petition for a writ of certiorari was filed on April 4, 1961.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Even though the petition was received by the Clerk on March 31, 1961, it was not filed until April 4, 1961, when the record was received. Accordingly, the petition is out of time, having been filed two days after expiration of the 30-day period for filing.

QUESTIONS PRESENTED

1. Whether an indictment charging the making of false oaths in a bankruptcy proceeding was sufficient, where it did not expressly allege that the false answers were material to the proceeding but did allege facts showing such materiality.

2. Whether the trial court's comments at one point in the trial were improper.

STATUTES INVOLVED

18 U.S.C. 152 provides in pertinent part:

* * *

> Whoever knowingly and fraudulently makes a false oath * * * in relation to any bankruptcy proceeding; * * *
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), provides in pertinent part:

> (a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court * * * to be examined concerning the acts, conduct, or property of a bankrupt; * * *

STATEMENT

Count 1 of an indictment returned in the United States District Court for the Eastern District of Michigan charged the petitioner and co-conspirator Kaufman with using the mails to defraud, in violation of 18 U.S.C. 1341. The scheme alleged was that petitioner and Kaufman would prepare a false financial

statement for Consolidated Radio and Appliance Company (Kaufman's corporation), showing that on May 15, 1952, petitioner sold to it, from Midstate Equipment Company (petitioner's corporation), $63,469.09 in accounts receivable in return for a note executed by Kaufman for $47,601.82, representing 75% of the purported value of the accounts receivable; that, in truth, these accounts were of little or no value; and that the false financial statement was to be used to defraud prospective creditors of Consolidated by obtaining property from them (App. 2a-4a).

Counts 2 through 5, inclusive, charged the petitioner with knowingly and fraudulently making false oaths on February 25, 1953, while being questioned in the Consolidated bankruptcy proceeding, in violation of 18 U.S.C. 152. The questions and answers set out in these counts involved the background leading to the sale of the accounts receivable by Midstate to the bankrupt Consolidated; petitioner's testimony that all of the accounts were from the metropolitan Detroit area; and his explanation as to why, when he was making demand upon Consolidated for payment on the note, he issued a Midstate check to Consolidated to cover the purchase price of certain merchandise and had Consolidated endorse the check back to him (App. 4a-5d).

At the close of the government's case, the court ruled that the indictment in counts 2 through 5, inclusive, sufficiently alleged facts showing that the false oaths were material to the proceeding in the bankruptcy court (App. 47b-49b), but granted a motion to dismiss count 1 relating to the conspiracy (App. 50a). The jury found petitioner guilty on counts 2 through 5, inclusive, and the court imposed concurrent sentences for

two years' imprisonment on each of these counts (App. 1a). On appeal (App. 1a), the conviction was affirmed (Pet. App. 1-8).

Pertinent evidence adduced at the trial may be summarized as follows:

1. Co-conspirator Kaufman[2] was the owner of Consolidated (App. 15a). Petitioner was the controlling owner of Midstate (App. 13b).

Kaufman testified that petitioner advised him to incorporate Consolidated, purchase accounts receivable from Midstate to get an inflated credit statement, purchase merchandise on the basis of this statement, transfer the merchandise to Midstate, and receive 50 cents on the dollar while permitting Consolidated to go bankrupt. Kaufman stated that both he and petitioner knew, at the time they entered into it, that this was a scheme to steal and defraud creditors (App. 4b, 5b, 15a). Pursuant to this plan, on May 15, 1952, Midstate sold $63,469.09 of accounts receivable[3] for $47,601.82, for which Consolidated gave Midstate a promissory demand note. Consolidated's financial statement listed the accounts receivable as assets (App. 16a-17a, 4b, 19b). Kaufman testified that petitioner told him that the accounts were delinquent and not collectible (App. 17a).[4]

---

[2] Kaufman, after Consolidated's bankruptcy, pled guilty to mailing an incorrect Consolidated financial statement and was sentenced to imprisonment for 18 months (App. 10b-11b).

[3] Of the accounts receivable cards purchased, an F.B.I. agent testified that 437 of them, representing $11,818.17, came from outside the metropolitan Detroit area (App. 45a). This was contrary to petitioner's testimony set out in count 3 (App. 5b).

[4] Petitioner testified at the trial that to the best of his knowledge none of the Midstate accounts was uncollectible (App. 56a), and that he did not agree to pay Kaufman 50 cents on the dollar for merchandise shipped by Consolidated to Midstate (App. 59a).

The total amount of merchandise obtained from creditors by Consolidated and shipped to Midstate was $56,754.22 (App. 7b). In purported payment for such shipments, Midstate would issue its check, usually unsigned, to Consolidated; Kaufman would endorse it on behalf of Consolidated and return it to Midstate with the amount to be credited on the note owing by Consolidated for purchase of the accounts receivable (App. 18a-19a, 7b-8b). For example, one Midstate check for $14,479.15 (Gov. Ex. 9) was issued at a time when its bank balance was only $58.15 and deposited after endorsement by Consolidated, the net effect being a deposit of the same amount withdrawn (App. 7b-8b; App. 28a-30a; and see App. 47a-48a).

There was also evidence that, in furtherance of the scheme to defraud, Midstate shipped to Consolidated worthless merchandise in order to "build up the amount" owed to Midstate (App. 9b, 15b-16b).

2. Government witness Davis, the trustee for the bankrupt Consolidated, testified that he and his staff made a thorough investigation of the accounts receivable and that they were not collectible (App. 7a, 8a). This colloquy occurred during Davis' testimony (App. 10a):

> THE COURT: (Interposing) How much money was turned in to you as trustee of this bankruptcy estate as a result of the efforts of the people that you designated to work these account slips, as a result of their work?
>
> A. None.
>
> THE COURT: What more has to be said?
>
> Are you satisfied, from your position as trustee of the bankrupt corporation, that an effort was made to honestly try and collect these accounts?

> MR. WALKER [defense counsel]: I would like to object to that, your Honor. I think that is calling for a conclusion. It is calling for a relation of events that somebody else participated in, and this man's knowledge of it would be purely hearsay.

The court overruled the objection, and the witness answered, "Very definitely" (App. 10a).

Later, the prosecutor offered to introduce into evidence the bankruptcy court file. Defense counsel objected that this would be hearsay (App. 12a, 13a). The court then inquired (App. 3b):

> What additional testimony do you want above and beyond the fact that this man testified that he collected nothing from these accounts receivable and his testimony that the people he designated to do the collecting and working on these account records were honest people?

The prosecutor answered that the nature of these accounts would be explained to the jury. The court stated that the accounts were in evidence, that the prosecutor could explain any one of them, and suggested that, if the prosecutor wanted to offer testimony as to experiences of the collectors, he should bring them in (App. 3b).

After defense counsel stated he had no questions for cross-examination, the prosecutor recalled the trustee to the stand and this testimony was given (App. 3b-4b):

> Q. (By Mr. Owen, continuing): Mr. Davis, as trustee of this bankrupt estate, did you yourself attempt to ascertain the collectibility of these accounts receivable?
>
> A. Yes, I did, I sampled probably—
>
> Q. (Interposing): You did?

A. I sampled approximately 50 of them myself. Found that I was making no progress. Couldn't locate the individuals. In many instances, fictitious addresses. And, as a result of it, I then turned it over to my own collection department to work on. They found them to be—

MR. WALKER (interposing): Now, just a minute as to what your collection department found. That is hearsay, your Honor; a conclusion.

THE COURT: He can't testify to what they found.

Q. (By Mr. Owen, continuing): Did the collection agency, to which you referred these accounts, collect them?

A. No, sir, they didn't.

ARGUMENT

1. In upholding the sufficiency of the indictment, both the district court and the court of appeals agreed with decisions in other circuits that, in order to be punishable under 18 U.S.C. 152, the false oath has to be material to the bankruptcy proceeding,[5] but held that materiality sufficiently appeared from the facts alleged in the indictment. This ruling was correct and presents no conflict with any other circuit. The questions set forth in counts 2-5 show on their face that they related to a sale of accounts by petitioner's corporation to the bankrupt. It thus appears from the face of the indictment that the questions asked petitioner and his answers related to "the acts, conduct, or property of a bankrupt". Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a) (*supra*, p. 2). In a proceeding under that provision (in which this petitioner was examined), a witness may be asked such questions

[5] *Meer* v. *United States*, 235 F. 2d 65 (C.A. 10); *United States* v. *Margolis*, 138 F. 2d 1002 (C.A. 3).

as will disclose the extent of the bankrupt's assets, where they could be recovered, and full information as to the bankrupt's property. See *Marx* v. *Chase National Bank*, 117 F. 2d 800, 801 (C.A. 2); *In re Yourovcta Home & Foreign Trade Co.*, 288 Fed. 507, 513 (C.A. 2); *Ulmer* v. *United States*, 219 Fed. 641 (C.A. 6), certiorari denied, 238 U.S. 638. It was manifestly material to the bankruptcy proceeding to discover how an asset of the bankrupt corporation, purportedly of some size, had been obtained.

2. Petitioner contends that during the examination of the government witness Davis, the bankruptcy trustee, the trial court invaded the province of the jury by implying that, without calling other witnesses who had made unsuccessful attempts to collect Midstate's accounts receivable, the testimony by the trustee that he collected nothing on these accounts was enough to show worthlessness of the accounts (Pet. 2, 8). The incidents involved are set forth on pp. 5-7 of the Statement, *supra*.

The comments by the court were not improper. The court, within its province as governor of the trial,[6] was indicating to the prosecutor that it thought he would be going into unnecessary matters by trying to introduce the bankruptcy file, in view of the fact that no money had been collected. The suggestion that it was not necessary to call additional witnesses merely kept cumulative evidence from being introduced. If petitioner seriously thought there was an improper invasion of the province of the jury by reason of the court's comments, he could have moved for a mistrial

[6] See *Quercia* v. *United States*, 289 U.S. 466, 469; *Glasser* v. *United States*, 315 U.S. 60, 82, 83.

or asked for a curative instruction. The court itself, in its final instructions, made clear that it did not intend to express any opinion on the facts of the case, and that the jury should not infer from the court's comments and questions addressed to witnesses that it was indicating any opinion as to the evidence, or what the jury's findings should be (App. 61a-62a). The argument here is an attempt to magnify passing comments out of all proportion in their setting.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961—592604/P O 1243

IN THE

Supreme Court of the United States

PETITIONER'S PETITION FOR REHEARING
AND MOTION TO SUPPLEMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 871

HARRY HAROLD CHERETON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S PETITION FOR REHEARING

Petitioner herein, HARRY HAROLD CHERETON, files this his Petition for Rehearing of the Order denying the instant Petition for Certiorari, on the following grounds:

1. It sufficiently appears that Petitioner was indicted for mail fraud and, on additional counts, indicted for a false oath in connection with a bankruptcy.

From the Appendix to Petition and the Opinion of the Circuit Court, it sufficiently appears that after the mail fraud indictment was dismissed, the only evidence relied upon by the Government is evidence supporting the scheme to defraud. This appears from the footnote in the Opinion which sets out the question and answers. Preliminarily, the question was:

> "What was the *BACKGROUND* leading up to this sale of accounts by your company to the bankrupt?"

The answer or contradiction of Kaufman was in answer to this question by Mr. Owen, the prosecutor:

> "Mr. Kaufman, . . . tell the court . . . the nature of this scheme . . . "

And then Kaufman's answers were, in effect, that in Kaufman's opinion it was a scheme to steal.

Apart from the fact that the question, posed called for an opinion of the witness on which no false oath prosecution can be made to stand, on the basis of the *Margolis* case, 138 F 2d 1002. Apart from that, all of Kaufman's answers contradicting CHERETON, were non sequita. They do not prove that the answer of CHERETON was false. In this connection, let's examine from the footnote to the Sixth Circuit Court's Opinion, the whole of CHERETON's answer and the whole of KAUFMAN's reply:

> "Question: What was the *background* leading up to this sale of accounts by your company to the bankrupt?
>
> "Answer: The only way I can answer that is this: Kaufman knew our business, he knew we were creating a large volume of sales through the direct installment sales business and he has been trying to get into this kind of business for I would say many years: in fact, back three or four or five years ago he wanted to learn this business and he even went to work for one of our branches for a period of three or four months to get some background information of this business. It was back four or five years ago—I am unfamiliar with the date—and he was always asking me for information how to get in this business. It is hard to start your business; the only way you can do is by starting from—making a running start. And we met on numerous occasions, I would say dozens and dozens of times, and he would talk to me, I would talk to him, and out of these conversations the idea was developed that he would buy these receivables."
>
> "In violation of Section 152, Title 18 U.S.C."
>
> "(56) Q. (By Mr. Owen, continuing): Mr. Kaufman, will you please tell the Court and jury, in your own words, in simple language, what was the NATURE OF THIS SCHEME and how you were going to effect it, and how you were going to profit from it, and how (57) you were going to conceal your operation, how you were going to avoid detection, if you can?
>
> "A. It started out first by incorporating the business. He advised me to incorporate; that I wouldn't

be personally liable. Then he proceeded to have a note drawn and made out to the corporation.

"Q. Is this the note which you identified as Exhibit No. 8?

"A. That is correct.

"Q. Go on.

"A. And a contract for the sale of the accounts receivable, and how to show an inflated net worth.

"From there, he advised me on what type of merchandise to buy, because he needed a certain type of merchandise in his operation, that I was to send him.

"He sent a man along with me on several buying trips to advise me as to what type of merchandise to buy, and who to buy it from, and in what amounts to purchase that I would be able to obtain from these people.

"First he would advise me to buy a small amount and to receive the merchandise and then to pay promptly, and then the second time is to always enlarge or double the order, which the creditors wouldn't pay any attention to, in order to keep them from wanting their money, so to speak—in other words, to keep them off our backs, so to speak.

"(58) Q. Did you find these suggestions and this advice effective?

"A. Yes, I did.

"Q. Did it work?

"A. Yes, it did.

"Q. Tell the Court and jury why Mr. Chereton went to such great pains and details to acquaint you with an operation of a business with which you were unfamiliar?

"A. Primarily, we had no idea of ever running the Consolidated Radio and Appliance as a business of this type. It was strictly an idea to obtain merchandise to be transferred to the Mid-States Equipment Company, where he would dispose of it through his company and return fifty cents on the dollar to me personally, and eventually let the Consolidated go into bankruptcy and wipe the whole thing out.

"Q. This was a scheme to steal, wasn't it?

"A. That is correct. To defraud the creditors.

"Q. You knew that was what it was when you entered into it?

"A. That is correct.
"Q. And you say Mr. Chereton knew of this, too?
"A. He advised me as to every detail.
"Q. Whose idea was it?
"A. Mr. Chereton's.
"Q. How did Mr. Chereton profit from this scheme?
"A: The *merchandise was shipped to his company.* He—
"Q. (Interposing): Merchandise was shipped to his company from (59) whom?
"A. From Consolidated.
"Q. That was your company?
"A. That is correct. And he disposed of the merchandise. He gave me the offices and places to ship the merchandise. He had offices throughout the country—various parts of the country—and I would ship the merchandise at his direction in what amounts he wanted to each of his offices."

It is incredible to believe that if the accounts were completely worthless Kaufman would agree to pay one-half of merchandise equivalent to $47,000 for something that he contends was worthless. But apart from the incredibility of Kaufman, there is a complete non sequita in his answers.

The instant decision from which certiorari is sought is clearly in conflict with the following Circuit Court opinions which have never been set aside:

NO PERJURY IN EXPRESSION OF OPINION

From *United States* v. *Margolis*, 138 F 2d 1002:

"7. PERJURY, Key 11(1)
"The expression of an opinion which is irrelevant cannot be subject of perjury.

"8. BANKRUPTCY, Key 486.
"Conviction of making false oath in bankruptcy proceeding could not be supported where conviction was based on defendant's answer to question as to whom machinery repossessed by him belonged, and it appeared that the question and answer were not pertinent to the inquiry. Bankr. Act Sec. 29, sub. b(2), 11 U.S.C.A. Sec. 52, sub. b(2)."

ESSENTIAL FACTS THEMSELVES MUST APPEAR IN INDICTMENT

From *Meer* v. *United States*, 235 F 2d 65; at page 67:

"(4) Since Count Three did not charge that the alleged false statement was material to the inquiry, we are of the opinion that it failed to alleged an essential element of the offense and that the motion to dismiss should have been sustained."

At page 65:

"3. INDICTMENT AND INFORMATION, Key 110(3)
"It is not sufficient to charge an offense in words of applicable statute, unless words themselves fully, directly and expressly, and without uncertainty or ambiguity, set forth all essential elements constituting the offense. 18 U.S.C.A. Sec. 152."

THE TEST OF SUFFICIENCY OF AN INDICTMENT IS THAT IT IS NECESSARY THAT SUFFICIENT FACTS BE ALLEGED TO INFORM THE DEFENDANT AND TO SHOW WITH ACCURACY TO WHAT EXTENT HE MAY PLEAD A FORMER ACQUITTAL OR CONVICTION

From *Rud*[illegible] v. *United States*, 254 F 2d 45, at p. 46:

"4. INDICTMENT AND INFORMATION, Key 71.
"'Test of sufficiency of indictment is that it must sufficiently apprise defendant of what he must be prepared to meet and in case any other proceedings are taken against him for a similar offense, that record show with accuracy to what extent he may plead former acquittal or conviction.'"

At page 48:

"(3-5) It is, of course, settled law that in order for an indictment to be valid it must allege all of the elements which are necessary to constitute a violation of the statute. But it is not necessary that the indictment follow the exact wording of the statute. Dunbar v. United States, 156 U.S. 185, 190, 15 S. Ct. 325, 39 L. Ed. 390; United States v. Marcus, 3 Cir., 166 F. 2d 497, 501. The test of the sufficiency of an indictment is that it

> must sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, that the record show with accuracy to what extent he may plead a former acquittal or conviction. Hagner v. United States, 285 U.S. 427, 431 . . . "

Under the clear mandate of the *Margolis* case, the question posed to CHERETON, calling for the background, even if the court feels that they are not his opinion, is no more than calling for the "events" leading up to the incident. There is nothing in CHERETON's answer that is contradicted in any way by Kaufman. Even assuming that Kaufman's answers were true they merely go a step further, but do not prove any falsity of CHERETON's answers which were complete as given. Presumably the Circuit Court set out in the footnote the strongest questions and answers it relied upon. There is further, as pointed out in the Petition for Rehearing, a clear conflict with *Meer*, where the Circuit Court says, p. 5:

> "We would hesitate to hold that an indictment in the exact words of a valid criminal statute was insufficient because it did not contain an element of the offense engrafted thereon by judicial decision. In such a case as the present one, it should be sufficient if the evidence disclosed that the question propounded related to a material matter. To us the point seems highly technical because even though materiality was not expressly alleged in the indictment, it clearly appeared from the questions and answers set forth therein that they were material to the inquiry in the bankruptcy proceeding. This is all that the decision in Meer required."

Inference: Even though the Circuit Court would hesitate to hold it, such an inference clearly contradicts with *Meer* v. *United States*, 235 F 2d 65.

It is unthinkable, and a severe miscarriage of justice to predicate a criminal conviction and a lengthy prison sentence on CHERETON's conscientious, correct and truthful an-

swer to a vague opinion-seeking question posed and based on anything as vague as "background." Similarly, Kaufman's response to this question was a matter of opinion.

> "Q. This was a scheme to steal, wasn't it?
> "A. That is correct."

This type of opinion evidence is severely condemned, not only by *Margolis*, but by a recent annotation in 66 ALR 2d 796, 800; where the annotator cites numerous cases that the opinion must not be elicited.

> "Appellee should not have been asked whether unlawful sales were made. The fact as to whether there had been sales might have been elicited from the testimony . . . The result of such negotiations is a question of law . . . therefore, a matter of opinion."

Citing also, *U. S.* v. *Smith* (1870), 66 ALR 2d 800:

> "a party cannot be convicted of perjury when the falsity of the oath is not attributable to a corrupt intention but to an error of judgment or a mistake as to the law or facts."

The above cited colloquy clearly shows immaterial, irrelevant conclusions of law, conclusions of the witness, and the question as posed calls for the opinion of the witness.

One could define "background" as the scene and also the "sum" of one's experience, training, education, etc. Could it be said that in answer to a question about background, if the witness left out some of his education, that perjury could be predicated of it? It is difficult to see how a conclusion of law, or conclusion of a witness could more be called for or evoked than by the posing of the question of background. False swearing implies a corrupt intent.

Even if the court should construe "background" as amounting to asking, "What are the facts leading up to this sale?" Kaufman's answers, although at variance with Chereton's and although they have engrafted on them a heinous and criminal scheme to defraud, which the trial